No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt),
Appellee.

ADDENDA AND SUPPLEMENT TO APPELLANTS' PETITION FOR A REHEARING.

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To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and to the Court:

It will probably be conducive to a clearer and better understanding of the case and of the petition for a rehearing, to set forth by this addenda and supplement to the petition, the opinion of Judge Dietrich, and in parenthesis point out analytically and more specifically, wherein it departs from the record and is also erroneous in matters of law.

I.

[Title of Court and Cause.]

"Before: RUDKIN, DIETRICH AND WILBUR, Circuit Judges.

DIETRICH, Circuit Judge:

The only question involved in this proceeding is whether a certain boat was the individual property of Louis Morgan, at the time he was adjudicated a bankrupt, or belonged to a copartnership consisting of the bankrupt and appellant Pearson. If the former, the trustee is entitled to possession, and if the latter, the trustee concedes right of possession in Pearson. That issue,—the only substantive one in the case—neither the referee nor the court below has determined."

(This entire paragraph of the opinion is inaccurate and proceeds on a misunderstanding of the record and the appeal; and it is also erroneous because it ignores the fundamental distinction between questions of *jurisdiction* and questions pertaining to the *merits*. The only questions possible on the record upon this appeal, are questions of *jurisdiction*. The record clearly shows there was no question or issue before the Court below or the referee, as to whether the boat in controversy is partnership property, and further that any such question is foreclosed and precluded by the failure of the appellee to controvert the allegations of the sworn plea to the jurisdiction and the sworn petition for review, showing that the boat is partnership property. This state of the record is held by the authorities cited at pages 9, 10 and 20 of the opening brief of appellants, to be conclusive that the boat is partnership property. Being partnership property, the Bankruptcy Court has no *jurisdiction* over it, as

distinctly held by the authorities cited at pages 10 and 20 of the brief. Nor did the referee hold to the contrary, but merely decided and very erroneously decided that the Bankruptcy Court has *jurisdiction* and exclusive jurisdiction to determine *by trial,* the merits of the issue as to whether the boat is partnership property or not. The referee expressly and rightly refused to decide the matter on its merits and simply left it to the Court for trial and decision; but the well settled law is that the Bankruptcy Court has no *jurisdiction* whatever over the case on its merits, as distinctly held by the authorities cited on the point in the opening brief, it being held by the same authorities that the *jurisdiction* is exclusively in the state Court by virtue of Section 23 of the Bankruptcy Act, and in a plenary suit. The record also shows that at the time of the filing of the petition and of the adjudication in bankruptcy, this being the "jurisdictional line of cleavage" in the Bankruptcy Court, as held by all the authorities on the point, the boat was in the valid *custodia legis* of the state Court, and that when the referee made his "turn-over" order appearing at page 21 of the record and referred to at pages 29 and 32, the boat was also in the valid *custodia legis* of the state Court, where it has ever since remained. There is no allegation in the trustee's petition for the "turn-over" order, that the adverse claim of appellants to the boat is *merely colorable,* nor any evidence that it is, nor any decision by the referee that such is its character; therefore and as held by the authorities cited at pages 14 and 27 of the brief, the claim must be held *not* merely colorable, but real,

substantial and *bona fide,* and such being its character, it is held by the many authorities cited at pages 13 and 14 of the brief, that the *jurisdiction* to decide it on the *merits* is exclusively in the state Court. It results that in the excerpt above given from the opinion of Judge Dietrich in the case, it was and is inaccurate to say that the question involved *in these proceedings,* is whether the boat is partnership property, and it is equally inaccurate to say that this is "the only substantive issue in the case," and that "neither the referee nor the Court below has determined it." This latter assertion in the opinion, would be more complete and accurate if there were added to it, the statement, "and would have no jurisdiction to determine it," for it is so held by all the authorities on the point, many of which are cited in the opening brief. The addition here suggested and necessary to make the opinion accurate in this particular, would also serve to furnish a conclusive answer to it, as you will readily perceive. Of course we concede that as a general proposition of law, the Bankruptcy Court has jurisdiction to determine *in limine* whether an adverse claim of title is *merely colorable,* but that is the limit of its jurisdiction. It has no jurisdiction of a trial on the merits, as this is vested exclusively in the state Courts by Section 23 of the Bankruptcy Act, as held by the many authorities cited on the point, at pages 13 and 14 of the opening brief. If in the preliminary investigation or examination of the adverse claim, the Bankruptcy Court or its referee should hold the claim to be *merely colorable* it would then, but not otherwise have competent authority to make a valid "turn-

over'' order, unless of course the case were one where the property had previously been in the actual custody of the Court or its referee and illegally removed therefrom, in which case, (which is not the case in the record here), it could be ordered restored by a ''turn-over'' order without any hearing or decision as to whether the adverse claim of title is merely colorable or not. As already pointed out, the ''turn-over'' order in the instant case relates to property never in the actual or constructive custody of the Bankruptcy Court, and therefore as held by all the authorities on the point, some of which are cited in the opening brief, the Court would have no jurisdiction to even determine whether the adverse claim of title to it as being partnership property, is merely colorable or not, and for this reason, no jurisdiction to make a ''turn-over'' order; but as shown by the record, the Court and its referee made the ''turn-over'' order appearing at page 21 and referred at pages 29 and 32, *without allegation, evidence, hearing, or decision that the claim is merely colorable,* thus eliminating from the case so far as this appeal is concerned, the only matter over which the Court could by any possibility have jurisdiction as an essential prerequisite to the validity of the ''turn-over'' order the referee made. The statement in the opinion of Judge Dietrich that no ''turn-over'' order was made, is refuted by the record, pages 21, 29 and 32. For the reasons we have given and fully sustained by the authorities cited in our briefs, the ''turn-over'' order, though sufficient in form (*Muller v. Nugent*, 184 U. S. 1; *Allen v. Voje*, 114 Wis. 1, 8; *United States v. Terry*, 41 F. 771, 773,

774), is void for want of jurisdiction, and therefore the District Court committed reversible error in *confirming* the order and denying the petition for review. The appeal therefrom is valid and the record amply sufficient to present the jurisdictional questions raised by appellants. It therefore is required by law that the appeal be determined on its merits and not dismissed.)

II.

The opinion of Judge Dietrich, next proceeds as follows:

> "The referee decided only that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. Being discontent with this ruling, made upon a preliminary objection, appellants without awaiting the event of a trial on the merits, petitioned the District Judge for a review, and the order from which the appeal is prosecuted went no further than to deny the petition. Manifestly, therefore, the appeal is premature."

(Now the obvious and conclusive answer to this is that the referee not only decided and very erroneously decided that the Bankruptcy Court had jurisdiction to entertain the issue, it being the well settled law as shown by the many authorities cited in appellants' briefs that no such jurisdiction exists, but the referee went further and made the following void "turnover" order:

> "The REFEREE: In the making of this order overruling the plea to the jurisdiction, the referee goes further and holds that the trustee is entitled

> to the possession of the boat, *and the order is that the boat be delivered to the trustee.* Under *this order of delivery, however, I will grant you a stay of five days. So ordered."* (R. 21, 29, 32.)

The order to show cause on which this "turn-over" order was made, expressly says:

> "It is ordered that Arvid Pearson and A. J. Hennessy show cause, if any they have, on the 27th day of October, 1928, at 10 o'clock A. M. why the said Arvid Pearson and A. J. Hennessy should not immediately *turn over* and deliver to the said A. W. Higgins, trustee herein, the possession of the boat 'Saxon.'" (R. 6.)

The statement in the opinion of Judge Dietrich that

> "appellants without awaiting the event of a *trial on the merits,* petitioned the District Judge for a review, and the order from which the appeal is prosecuted went no further than to deny the petition,"

is conclusively answered by the point, sustained as it fully is, by the authorities cited in appellants' briefs, that upon the record, there is no *jurisdiction* in the Bankruptcy Court or its referee to hold *"a trial on the merits,"* as the jurisdiction is vested exclusively in the state Courts by Section 23 of the Bankruptcy Act to hold such trial; therefore appellants were not required by law to await the event of a *trial on the merits* before the Bankruptcy Court, as such a trial would be absolutely void for want of jurisdiction. And Judge Dietrich is in error in stating as he does in the opinion filed, that the order from which the appeal is prosecuted "went no further than to deny the petition," as it does go further and *confirms* the

"turn-over" order of the referee. (R. 21, 29, 32, 39, 40.) But denying the petition for review, containing the prayer that the "turn-over" order be adjudged void for want of jurisdiction, is manifestly sufficient to present the jurisdictional question on the appeal. It results that the appeal is not premature and that Judge Dietrich is mistaken in stating that it is. Of course the evident purpose of the "turn-over" order as made by the referee, is the illegal one to bring the boat into the prohibited jurisdiction of the Bankruptcy Court *for trial on the merits* of the adverse claim of title asserted by appellants. Doubtless they could consent to such a trial, but it would be void in any event as it is elementary that consent cannot give jurisdiction over the subject matter. Nor would appellants ever give their consent, as the case is properly before the state Court in the claim and delivery action there pending and awaiting trial in due course, and the boat is in the valid *custodia legis* of that Court, and in said action, as held by the many authorities cited on the point, in appellants' briefs. It would therefore manifestly be worse than futile to "await the event of a trial on the merits" in the Bankruptcy Court, such as required by the opinion of Judge Dietrich, when it is clear from the record and the well-settled law on the point, that the Bankruptcy Court is entirely without jurisdiction of the case, so far as the appellants are concerned.)

III.

The opinion of Judge Dietrich then proceeds and concludes:

> "In an ordinary case at law or in equity an order overruling an objection to the courts' jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. Appellants could have no real grievance unless and until the referee entered a turn-over order. After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain. Appellate courts do not sit to anticipate possible grievances or to try out controversies in piecemeal. The appeal will, therefore, be dismissed without prejudice to any question of jurisdiction or upon the merits. Costs to appellee."

(What we have already said herein, sufficiently and we think conclusively answers this portion of the opinion. The order here involved is the "turn-over" order of the referee, appearing in the record, pages 21, 29, 32, and Judge Dietrich is mistaken in disposing of the case as if no such order had been made. He is also mistaken in asserting that "after a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain." The obvious and conclusive answer to this is that the Bankruptcy Court has no jurisdiction of a trial or hearing *on the merits,* but as held by the authorities cited on the point in appellants' briefs, the jurisdiction is exclusively in the state Court, under Section 23 of the Bankruptcy Act and under the general doctrine of well settled law, that the valid *custodia legis* of the state Court, respecting the boat in

controversy, precludes such a thing as jurisdiction of the issue or the case, by the Bankruptcy Court. That the *custodia legis* of the state Court is valid and exclusive is clearly shown in the briefs of appellants and by the many authorities there cited, bearing in mind of course that the jurisdiction of the state Court rests upon the averment in the complaint there filed, that the boat is *partnership property* (R. 8, 9), from which it results that the Bankruptcy Court would have no jurisdiction over it, as held by the authorities cited at page 10 of appellants' opening brief. And also bearing in mind that in the record on this appeal and as held by the authorities cited at page 9 of the brief, the appellee has admitted that the boat is partnership property. Also bearing in mind that the well settled law requires it be held on this appeal and upon the record, that the adverse claim of title to the boat as partnership property, must be considered real, substantial and *bona fide,* as held by the authorities cited at pages 14 and 27 of the brief, and therefore it results that the jurisdiction is exclusively in the state Court, under Section 23 of the Bankruptcy Act, and so held by the authorities cited at pages 13 and 14.)

IV.

In conclusion, not only is the opinion fundamentally erroneous in disregarding the referee's "turn-over" order appearing in the record, pages 21, 29 and 32, but it entirely fails to answer the important objection that the order operates to deprive the appellants of their property without "due process of law" and in

violation of the Fifth Amendment, by taking it from their possession, which at present is also the *custodia legis* of the state Court, and so held by the authorities cited at page 19 of the opening brief and page 13 of the record, and giving it to the trustee, *before* there is any hearing or decision upon their legal right to retain the possession and without any allegation in the trustee's petition for the "turn-over" order and without any evidence or decision in the case that appellants' adverse claim of title to the boat as partnership property is *merely colorable*. That in such a case to take the boat from their possession by the "turn-over" order appearing at page 21 and mentioned as such by the referee, at pages 29 and 32 of the Record, and give it to the trustee and compel appellants to thereafter litigate their claim to the boat before the Bankruptcy Court, which according to all the authorities on the point, has no jurisdiction of the matter, is depriving them of their property without "due process of law" is distinctly held by the authorities cited at pages 17, 22 and 23 of the opening brief and page five of the petition for a rehearing. This conclusive point, going to the *jurisdiction* of the referee to make the "turn-over" order, has doubtless been disregarded and erroneously disregarded, by reason of the mistaken and inadvertent assertion in the opinion that no "turn-over" order has yet been made. If the order appearing in the record at page 21 and referred to at pages 29 and 32 is not a "turn-over" order, as contended by the parties and held by the District Court and its referee, then it should be explicitly so decided on this appeal and

not left to mere inference. As the matter now stands it is uncertain and cannot be ascertained from your opinion and decision whether you hold that the order is insufficient in form or substance as a "turn-over" order, or you have failed to discover its existence in the record. In the event of an attempt to enforce the order, the question would become important. It is important anyway that the validity of the order be determined on this appeal. If the order is held to be imperfect or insufficient in form or substance, then according to the rules governing appellate remedial procedure, the law requires that on this appeal the jurisdictional questions presented by appellants be determined. It is only the complete absence of a "turnover" order, not merely an imperfect one, that would justify the dismissal of the appeal.

V.

It is respectfully submitted that the petition for a rehearing should be granted.

Dated, San Francisco,
July 25, 1929.

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VI.

Certificate of Counsel.

It is hereby certified that in our judgment and in the judgment of each of us, the foregoing *addenda* and supplement to the petition for rehearing heretofore served and filed, is well founded; and we do further hereby certify that said addenda, supplement, and petition are not interposed for delay.

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